IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-119

JAMES DAY HODGSON, Secretary of Labor,

Plaintiff-Respondent,

and

MIKE TRBOVICH (Proposed Intervenor),

Petitioner,

—v.—

UNITED MINE WORKERS OF AMERICA,

Defendant-Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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Interest of *Amicus Curiae*

The American Civil Liberties Union is a nation-wide, non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been concerned with the special responsibility labor unions have to maintain democratic standards. In a membership organization, the freedom of election and balloting is the ultimate and most important freedom in the democratic conduct and control of the group. Hence, ACLU is espe-

cially concerned that the election provisions of the Labor-Management Reporting and Disclosure Act of 1959, Title IV, 29 U.S.C. §§482-483 (hereinafter LMRDA) are interpreted and administered in such a way as to most assure free and open union elections.

This case raises important questions concerning the ability of union members to intervene in law suits brought by the Secretary of Labor to enforce the provisions of Title IV. It concerns, therefore, proper judicial enforcement of the statutory guarantee of free and open union elections.

Letters of consent have been filed with the clerk.

Question Presented

Whether a member of a labor organization, who concededly satisfies all conditions for intervention of right under Rule 24 (a), FRCP, is entitled to intervene, on behalf of himself and other members desiring a new election of union officers, in a civil suit brought by the Secretary of Labor under the LMRDA, to set aside a union election.

Statement of the Case

The *Petition for Writ of Certiorari* brings before this Court one in a series of law suits brought in the course of recent efforts to reform and democratize one of the nation's largest labor unions, the United Mine Workers of America (hereinafter UMW). The history of these efforts, and of this law suit, are set out in some detail in the *Petition for Writ of Certiorari*, pp. 7-19. Suffice it to say, this Court is asked to review the refusal of the courts below to permit the Petitioner, Mike Trbovich, to intervene in the suit filed by the Secretary of Labor to set aside on grounds of massive election irregularities the UMW's December 9, 1969 election of International Officers.

The Petitioner was the campaign manager for the late Joseph A. "Jock" Yablonski, who unsuccessfully opposed the incumbent UMW president, W. A. Boyle, in the December 9, 1969 election. After the murder of Mr. Yablonski, and his wife and daughter, in January, 1970, the Petitioner succeeded to the complaint alleging election irregularities which had been filed by Mr. Yablonski on December 18, 1969. Presently, Petitioner is National Chairman of the Miners for Democracy, a reform party within the UMW.

On March 5, 1970, after conducting his investigation of the December 9, 1969 election, the Secretary of Labor filed the present law suit, based on Petitioner's complaint, in the District Court for the District of Columbia. On October 2, 1970, Petitioner moved, on behalf of himself and the Miners for Democracy, under Rule 24 (a), for leave to intervene as of right or, in the alternative, for permission to intervene under Rule 24 (b). He proposed additional allegations and claims for relief, which are set forth on pages 17 to 18 of the *Petition for Writ of Certiorari.* Intervention was denied solely on the ground that by according the Secretary sole power to initiate suit under Title IV, Congress also precluded intervention by aggrieved union members.

Reasons For Granting the Writ

Certiorari should be granted because the courts below decided an important question of federal law which has not been, but should be, settled by this Court, namely whether a member of a labor organization, who concededly satisfied all conditions for intervention of right under Rule 24 (a), FRCP, is entitled to intervene, on behalf of himself and other members desiring a new election of union officers, in a civil suit brought by the Secretary under the LMRDA, to set aside a union election.

This Court has held that suits falling "squarely within Title IV of the [LMRD] Act . . . are to be resolved by the administrative and judicial procedures set out in that Title." *Calhoon* v. *Harvey,* 379 U.S. 134, 141. With certain exceptions not relevant here, the statute "sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court." *Calhoon* v. *Harvey, supra,* 379 U.S. at 140.

According to this Court, Congress sought to accomplish three goals through Title IV's exclusive enforcement machinery. (1) Individuals should not be permitted "to block or delay union elections by filing federal-court suits for violation of Title IV." *Calhoon* v. *Harvey, supra,* 379 U.S. at 140. (2) "Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies . . ." *Calhoon* v. *Harvey, supra,* 379 U.S. at 140. (3) When unions fail to remedy election difficulties internally, Congress chose "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion *before resort to the courts.*" *Calhoon* v. *Harvey, supra,* 379 U.S. at 140-41. (Emphasis added.)

A fair reading of the *Calhoon* decision makes it clear that the Court ruled that the Secretary has exclusive discretion in deciding whether suit will be brought to enforce Title IV rights. It is a considerable extension of *Calhoon,* however, to the proposition that once suit is filed by the Secretary, aggrieved union members are barred from inter-

vening even though they meet the requisites of Rule 24 of the Federal Rules of Civil Procedure. But the Courts below made precisely this extension, as did the courts in *Stein* v. *Wirtz,* 366 F.2d 188 (10th Cir.), *cert. denied,* 386 U.S. 996 (1966).

This Court's holding and rationale in *Calhoon* do not by themselves justify preclusion of intervention by interested and aggrieved union members *once suit has been filed.* In that case the Court was concerned only with exclusivity of the Title IV machinery, and the Secretary's control over enforcement, *"before resort to the courts," Calhoon* v. *Harvey, supra,* 379 U.S. at 140-141. Once the Secretary files his suit, his exclusive control ends. The trial court is then in control. Different considerations become relevant to the question of who may partipicate in the proceedings. See Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721, 726-27 (1967). Further, none of the policy considerations discussed in *Calhoon* pertains once the Secretary has decided to file suit: (1) If any union election is blocked or delayed, it is because the Secretary has exercised his exclusive jurisdiction to bring suit. Intervention by interested individuals will not change that fact. (2) Once the Secretary has filed suit, the time for "allow[ing] unions great latitude in resolving their own internal controversies . . ." obviously has passed. *Calhoon* v. *Harvey, supra,* 379 U.S. at 140. (3) So has hope of "bringing about a settlement through discussion *before resort to the courts.*" *Calhoon* v. *Harvey, supra,* 379 U.S. at 140-41. (Emphasis added.)

It is not at all unusual for parties who are unable to bring suit to be empowered to intervene once suit is brought. For example, this Court has long held in diversity of jurisdiction cases that parties may intervene even

though they would have destroyed federal court diversity jurisdiction if they had originally been parties. *Phelps* v. *Oaks*, 117 U.S. 236 (1886). See *Formulabs, Inc.* v. *Hartley Pen Co.*, 318 F.2d 485 (9th Cir. 1963), *cert. denied*, 375 U.S. 945; *Pennsylvania R.R.* v. *Erie Avenue Warehouse Co.*, 302 F.2d 843, 845 (3rd Cir. 1962).

A compelling precedent in a closely analogous area indicates that the *Calhoon* principle should not be extended. In *International Union, UAW* v. *Scofield*, 382 U.S. 205, this Court decided that parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings. Just as under Title IV of the LMRDA, the scheme of the National Labor Relations Act (hereinafter NLRA) places in the Board and its General Counsel exclusive power over enforcement of the statute and prosecution of violations. Just as under Title IV, the NLRA was silent with respect to the right of a private party, who is successful in the administrative process, to intervene in judicial review proceedings. Just as under Title IV, in the NLRA, public and private interests are "interblend[ed] in the intricate statutory scheme." *International Union, UAW* v. *Scofield*, *supra*, 382 U.S. at 220. Yet in *Scofield*, the Court held in favor of intervention, declaring: "To employ the rhetoric of 'public interest,' however, is not to imply that the public right excludes recognition of parochial private interests." 382 U.S. at 218.

In the light of the *Scofield* precedent, it cannot be gainsaid that *Calhoon* should be extended to preclude intervention by complainants under Title IV, who are successful before the Secretary. Compare *Shultz* v. *United Steelworkers of America*, 312 F. Supp. 538, 539 (W.D. Pa. 1970), where a union officer whose election was challenged by the Secretary's suit was held to sufficient interest to

justify intervention "to protect his property interests"—presumably in his job.

Even apart from the *Scofield* decision, it is by no means clear that Title IV should be read to preclude intervention by successful complainants in suits filed by the Secretary.

First, Title IV is itself silent on the point. Although the enforcement machinery established in Title IV is exclusive, the provisions for enforcement are to be construed generously, to assure vindication of "the interests protected by §401." *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463, 475. Hence this Court has held that an intervening union election does not moot a suit brought by the Secretary (*Wirtz* v. *Local 153, supra*), and the Secretary's cause of action under the statute is not limited solely to the allegations made in the union member's complaint to the union and to the Secretary (*Wirtz* v. *Local 125, Laborers' Int'l Union,* 389 U.S. 477). Similarly, where an aggrieved union member can expand upon the Secretary's district court complaint, and thereby assure complete vindication of the interests protected by §401, 29 U.S.C. §481 (see *Petition for Writ of Certiorari,* pp. 35-37), it seems appropriate that he should be allowed to intervene in the Secretary's suit. The legislative history of Title IV amply supports an interpretation which supports such intervention. See *Petition for Writ of Certiorari,* pp. 23-29.

Second, Title IV was enacted seven years *prior* to the 1966 amendment of Rule 24, which governs intervention generally in district court suits. According to this Court, "some elasticity was injected" in Rule 24 by the 1966 amendment. *Cascade National Gas Corp.* v. *El Paso Natural Gas Corp.,* 386 U.S. 129, 134. As the Secretary of Labor has conceded in oral argument (*Petition for Writ of Certiorari,* p. 18), the Petitioner meets all the requisites for intervention under Rule 24. It is therefore necessary

for this Court to resolve the question whether Title IV, which preceded issuance of amended Rule 24, constitutes an exception to the general rule of civil procedure which permits intervention as a matter of right:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Third, compelling issues of fairness, not unlike those of constitutional due process, are present in this case and should be resolved by this Court. Affirmative steps taken by the Petitioner were jurisdictional requisites to the Secretary's cause of action. 29 U.S.C. §482. The interest being sued upon is that of the Petitioner, and those he represents, not that of the Secretary. The Petitioner and those he represents will feel the burden or gain the benefit of any settlement of this law suit, not the Secretary. The Petitioner and those he represents are the experts about the Respondent-Union and its election processes (*Petition for Writ of Certiorari*, pp. 9-17, 35-37), not the Secretary. With the federal courts increasingly enabling private parties to act as "private attorneys general" to enforce laws securing the public interest it seems strange indeed to preclude interested private parties, like the Petitioner, from intervening in public law suits designed more to secure their interests than to secure those of the public. See, *e.g., Common Cause* v. *Democratic National Committee*, D. Ct. D.C. Civ. Action 61-71 (1971); *Office of Communication, United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966); see also *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150.

CONCLUSION

Because the issues in this case are of paramount importance to the administration of Title IV of the LMRDA, and to vindication of the interests secured thereunder, *amicus curiae* respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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